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No. 93-208

In The

Supreme Court of the United States

October Term, 1993

IDAHO HISPANIC CAUCUS, INC.,
an Idaho Nonprofit Corporation, al al.,

Appellants,

v.

STATE OF IDAHO, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Idaho

MOTION OF APPELLEE STATE OF IDAHO TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals have the authority to transfer an appeal to this Court when Appellants appealed to the wrong court and the time for direct appeal had passed?

2. Alternatively, have Appellants, on this record, presented a substantial question?

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On Appeal From The United States District Court For The District Of Idaho

MOTION OF APPELLEE STATE OF IDAHO TO DISMISS OR AFFIRM

Pursuant to Sup. Ct. Rule 18.6, Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge panel on the grounds that the appeal has not been taken in time and that the question presented is so unsubstantial on this record as not to need further argument.

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 610; 28 U.S.C. § 1291; and S.Ct. Rule 18.1. The pertinent text to these supplemental statutes is set forth in Appellees' appendix.

STATEMENT OF FACTS

On February 28, 1992, the Idaho Legislature, as required by art. 3, sec. 4 of the Idaho Constitution, passed legislation to reapportion itself. The legislation, House Bill 760, received bipartisan support and was signed into law by Governor Andrus on March 2, 1992. House Bill 760, now codified as Idaho Code § 67-202, reduces the size of the legislature from 42 to 35 districts. The plan provides for one state senator and two state representatives per district. There are no floaterial districts. Further, the reapportionment plan enacted by the legislature contained a 9.9 percent deviation, rendering it presumptively constitutional under the Supreme Court's one person-one vote principle. *Brown v. Thomas*, 462 U.S. 835 (1983).

A prior reapportionment plan, Senate Bill 1269, was passed by the Idaho Legislature and vetoed by Governor Andrus. That bill received no support from Democratic legislators, and the veto message by Governor Andrus stated that he would sign a bill reapportioning the Idaho Legislature only if the legislation received bipartisan support.

It is important to note that House Bill 760 did not geographically divide any consequential portion of the

four Indian reservations in the State of Idaho. Representatives from Idaho's Indian tribes testified before legislative subcommittees requesting that the reservations be left intact within the respective districts. Further, the legislature did attempt to accommodate the concerns of Idaho's Hispanic population after receiving testimony at legislative hearings. For example, in Canyon County, the primary county involved in this case, the legislature created three districts comprised of 8.7 percent, 10.6 percent and 20.1 percent Hispanics. In other words, the legislature concentrated most Hispanics in one legislative district in Canyon County.

On May 5, 1992, the Idaho Hispanic Caucus, Inc., Appellants herein, filed its complaint challenging House Bill 760 as violative of the United States Constitution and the Voting Rights Act of 1965, as amended in 1982. 42 U.S.C. § 1973 (Supp. 1992). Appellants alleged that House Bill 760 diluted Hispanic voting strengths in Canyon County, Magic Valley, and the Pocatello area. Appellants also claimed that the plan was invalid due to the multimember districting, political gerrymandering, and efforts by legislators to protect incumbents. Appellants' complaint further alleged that House Bill 760 diluted the voting strength of Idaho's Indian populations.

Plaintiffs requested a three-judge panel be convened to hear their claims pursuant to 23 U.S.C. § 2284, and a three-judge panel was properly convened. On July 2, 1992, the State of Idaho, Appellees herein, filed its motion for summary judgment. Oral argument was heard on September 21, 1992, and on December 10, 1992, the panel

granted the State of Idaho's motion for summary judgment, thereby denying Plaintiffs' claim for injunctive and other relief.

On January 7, 1993, Appellants filed a notice of appeal with the Ninth Circuit Court of Appeals. Appellees filed a motion to dismiss Appellants' appeal on May 27, 1993, based upon the fact that direct appeal to the United States Supreme Court was the proper course of procedure under 28 U.S.C. § 1253. On June 25, 1993, the Ninth Circuit Court of Appeals dismissed the appeal for lack of jurisdiction, but then purported to "transfer" the appeal to this Court.

ARGUMENT

1. THE COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE THE APPEAL WAS NOT TAKEN IN TIME

Appellees move this Court to dismiss this appeal because it was not taken in time. Appellants had 30 days to file a direct appeal to this Court. *See* Sup. Ct. Rule 18.1. It is now nine months since the three-judge panel's decision. Appellants' failure to file a timely appeal cannot be circumvented by the Ninth Circuit's misapplication of 28 U.S.C. § 1631, the limited transfer statute employed. That statute does not grant the Ninth Circuit authority to transfer cases to the United States Supreme Court. Thus, Appellants' failure to follow the proper procedural course warrants dismissal.

As noted, when Appellants brought their challenge to Idaho's statewide legislative reapportionment plan, alleging violations of the United States Constitution as well as section 2 of the Voting Rights Act, they requested that a three-judge panel be convened to hear their claims. 23 U.S.C. § 2284 requires that a three-judge panel be convened "when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body." As required, a panel was convened.

When the panel granted Appellees' motion for summary judgment, Appellants' next step pursuant to 28 U.S.C. § 1253 should have been a direct appeal to this Court. 28 U.S.C. § 1253 provides:

> **Direct appeals from decisions of three-judge courts.** Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Here, since a properly convened three-judge panel had denied injunctive and other relief, Appellants' clear course of action was a direct appeal to the Supreme Court. Moreover, under Sup. Ct. Rule 18.1, Appellants had 30 days in which to make this appeal. Thus, Appellants' appeal should have been filed with this Court by January 11, 1993.

Rather than filing a direct appeal to the Supreme Court, on January 7, 1993, Appellants filed their appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals did not have jurisdiction. 28 U.S.C.

§ 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of district courts of the United States . . . except where a direct review may be had in the Supreme Court." Appellants' right to pursue a direct appeal to this Court also served to deprive the Ninth Circuit Court of Appeals of any jurisdiction.

Appellees filed a motion to dismiss with the Ninth Circuit Court of Appeals, since that court did not have jurisdiction. The Ninth Circuit Court of Appeals clearly understood Appellants had filed in the wrong court, and the court granted Appellees' motion to dismiss. However, at the same time, the Ninth Circuit also purported to "transfer" the appeal to this Court pursuant to 28 U.S.C. § 1631. This was on June 25, 1993, more than six months after the three-judge panel's final order.

28 U.S.C. § 1631 does not give the Ninth Circuit authority to transfer appeals to the Supreme Court. 28 U.S.C. § 1631 provides:

> **Transfer to cure want of jurisdiction.**
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon

> which it was actually filed in or noticed for the court from which it is transferred.

This statute does grant the Ninth Circuit Court of Appeals some authority to transfer cases to cure jurisdictional defects. However, transfers can only be made to "such court" as is "defined" by 28 U.S.C. § 610, which states:

> **Courts defined**
>
> As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

The United States Supreme Court is notably absent from this list of courts to which transfers may be made.

The Ninth Circuit, in dismissing the appeal, was clearly aware Appellants had not followed the proper procedural route. Of course, by June 25, 1993, it was also apparent Appellants' 30-day time period to appeal to this Court had long since run. The Ninth Circuit, in its effort to save Appellants' case, acted beyond the scope of authority granted to it.

In *Donovan v. Richland Cty. Ass'n for Retarded Citizens*, 454 U.S. 390 (1982), this Court was presented with a similar situation. Appellants had improperly appealed to the Ninth Circuit Court of Appeals from a three-judge panel decision. In *Donovan*, the Ninth Circuit rendered an opinion and an appeal was filed with this Court from that decision. This Court first vacated the Ninth Circuit's

judgment on the ground that the Court of Appeals lacked jurisdiction. This Court then dismissed the appeal, stating the appeal was time barred:

> In addition, the appeal filed from the decision of the Court of Appeals must be dismissed. Appellants' proper course of conduct was to file a direct appeal from the decision of the District Court. At this time, however, such relief is foreclosed by 28 U.S.C. § 2101(a).

454 U.S. at 390.

The procedure followed in cases involving apportionment of statewide legislative bodies advances critical public policy concerns in a federal/state system of government such as ours. Direct appeal to the Supreme Court provides an expedited review and final decision. It acknowledges the importance of state legislatures in our system of government and the corresponding importance of avoiding prolonged and unnecessary disruption of state legislative bodies.

Having failed to follow the proper procedural course, Appellants' appeal should be dismissed. Moreover, the Ninth Circuit Court of Appeals should not be allowed, through its misapplication of a limited transfer mechanism, to circumvent the strict time limits for direct appeals to this Court. As in *Donovan*, Appellants' predicament is a result of their "simple failure . . . to follow the clear commands" of the procedural statute at issue. 454 U.S. at 391. Not only does 28 U.S.C. § 1253 make clear where this appeal should have been filed, so do numerous reapportionment opinions issued by this Court. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075 (1993); *Voinovich v.*

Quilter, ___ U.S. ___, 113 S.Ct. 1149 (1993). Each of these reapportionment cases involved direct appeals to this Court from three-judge panel decisions. Indeed, in an earlier opinion, *Chapman v. Meier*, 420 U.S. 1, 14 (1974), this Court expressly stated that a direct appeal to it from a three-judge panel decision addressing statewide reapportionment was proper:

> Subject matter of this kind is regular grist for the three-judge court, and that route typically has been employed under conditions similar to those present here. . . . We think this is correct procedure and we conclude that we have jurisdiction.

The statutes at issue, as well as prior Supreme Court opinions, give clear guidance as to the proper appellate procedure.

It is now nearing one year since the three-judge panel issued its decision. Appellees move that this appeal be dismissed on the ground that it has not been taken in time.

2. THE QUESTION PRESENTED IS SO UNSUBSTANTIAL ON THIS RECORD AS NOT TO REQUIRE FURTHER ARGUMENT

Appellees believe that relief is foreclosed in this case by the 30-day time limit for direct appeals. However, in an excess of caution, Appellees will also address Appellants' contention that this appeal raises a substantial question. Based upon this record, the question presented is so unsubstantial as not to require further argument.

Appellants contended, in district court, that they should be able to bring an "influence" claim under the Voting Rights Act. In *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), this Court held that, in order to sustain a section 2 claim, a minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district." The Court also noted that "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 451, n.17.[1]

Since *Gingles*, lower courts have applied this bright-line test and rejected challenges where the minority could not constitute a majority in a single-member district, but nevertheless sought to bring an "influence" claim. For example, in *McNeil v. Springfield Park District*, 851 F.2d 937, 944 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989), the Seventh Circuit reasoned that to create a new cause of action for influence claims under section 2 would "invite[] courts to build castles in the air, based on quite speculative foundations." Likewise, in *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court followed the Seventh Circuit in rejecting an influence claim, stating:

> Courts must . . . measure the alleged discriminatory election system against an ideal electoral system which does not contain the challenged structure. . . . If the minority group is disbursed

---

[1] The *Thornburg* test also requires a showing that the minority is politically cohesive and that whites vote as a bloc usually to defeat the minorities' preferred candidates. *Id.*

> throughout the electoral district or is so small in proportion to the electorate as a whole, such that even under a single-member district plan the minority is not assured the power to elect representatives of its choice, the at-large feature of the election system, by itself, cannot be said to violate Section 2.

876 F.2d at 455. To do otherwise, the court noted, would be to engage in sheer speculation about the outcome of whatever remedy could be imposed. "Courts do not adjudicate with crystal balls." *Id.* More recently, in *Turner v. Arkansas*, 784 F.Supp. 553 (E.D. Ark. 1991), *summ. aff'd* ___ U.S. ___, 112 S.Ct. 2296 (1992), a three-judge panel unanimously rejected an influence claim, and that decision was summarily affirmed by this Court.

In this case, the three-judge panel drew upon a solid body of case law which held that claims such as Appellants' cannot be brought under the Voting Rights Act. Moreover, the panel had before it a substantial factual record to support its determination. Appellants neither alleged nor argued that, in conjunction with white votes, they could be assured the power to elect candidates of their choice. Rather, they contended that the first prong of the *Gingles* test "should only be applied in those actions where a minority is able to constitute a majority of a single-member district." Appellants' theory was that the brightline test only applied where it could be met. They offered nothing more on this. Appellants then asked the panel to "maximize[] the political participation of the Hispanic population" and requested the court provide Appellants special treatment through the creation of a house subdistrict and draw that district in a manner that

absolutely maximized their potential voting influence. All districts in Idaho, whether or not they contain Hispanics, are allocated two representatives pursuant to the Idaho Constitution. The court reviewed numerous documents evidencing the extensive legal counsel Idaho's legislature had received throughout the reapportionment process, the attempts that had been made to reconcile the various and sometimes conflicting interests and values involved, and the efforts on the part of the legislature to fairly accommodate Idaho's Hispanic and Native American population. The court, in reaching its decision to reject Appellants' claim, concluded that "the record suggests that, while the result may not be perfect and may not please 100 percent of the population, Idaho's legislative redistricting plan attempted to accommodate, rather than discriminate against, the concerns of the Hispanic and Native American minority groups."

Like *Turner v. State of Arkansas*, 784 F.Supp. 553 (E.D. Ark. 1991), the question presented on this record is so unsubstantial as not to require further argument. Appellees ask that the three-judge panel's decision be summarily affirmed.

CONCLUSION

Appellants failed to follow the clear rules, and their appeal should be dismissed for not having been timely made. In the alternative, Appellees move, for the reasons stated herein, that the judgment be summarily affirmed.

Respectfully submitted,

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APPENDIX

§ 610. Courts defined

As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court and the Court of International Trade.

(As amended Oct. 31, 1951, c. 655, § 44, 65 Stat. 725; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Oct. 10, 1980, Pub. L. 96-417, Title V, § 501(15), 94 Stat. 1742; Apr. 2, 1982, Pub. L. 97-164, Title I, § 120(a), 96 Stat. 33.)

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§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

Rule 18. Appeal from a United States District Court

.1. A direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after the entry of the judgment sought to be reviewed. The time may not be extended. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment, or part thereof, appealed from and the date of its entry, and shall specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding pursuant to Rule 29 and proof of service must be filed in the district court with the notice of appeal.